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In The

Supreme Court of the United States

October Term, 1991

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October 21, 1991

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QUESTION PRESENTED FOR REVIEW

Given the comprehensiveness of the ERISA remedial scheme and the absence of any ERISA policy to be served, may the courts fashion a common-law right of action for contribution and indemnity in ERISA actions for breach of fiduciary duty?

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OPINIONS BELOW

The opinion of the Court of Appeals (reproduced at Appendix A-27 to A-41) (hereinafter "A-"), issued on July 25, 1991, is reported at 939 F.2d 12 (2d Cir. 1991). The opinion of the District Court, issued on December 27, 1990 (A-15 to A-26), is reported at 753 F. Supp. 81 (W.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 25, 1991. A-27. Jurisdiction to review the judgment of the

Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This petition involves various provisions of the Employee Retirement Income Security Act (29 U.S.C. ch. 18), especially 29 U.S.C. § 1103(a), 29 U.S.C. § 1104(a), 29 U.S.C. § 1105, and 29 U.S.C. § 1132. The provisions involved are lengthy, and their pertinent text is set forth in the Appendix (A-2 to A-14).

STATEMENT OF THE CASE

Introduction

This petition presents to the Court an issue that now divides the federal courts. The Second Circuit Court of Appeals has determined to create, for the first time in any jurisdiction, a common-law cause of action entitling a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") to sue a co-fiduciary for contribution and indemnity. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991) (A-27 to A-41). Other federal courts, including the Ninth Circuit Court of Appeals, have reached a contrary conclusion (see pages 5 to 8 below).

How the case arose

The Fairway Spring Company, Inc. Restated Pension Plan was established by Fairway Spring Co., Inc., a small specialty manufacturing business in upstate New York, to provide retirement income for its employees. Unfortunately, between 1982 and 1984, the trustee of the Plan, one Glen E. Dawson, put its funds into a series of fraudulent investment schemes. As a result, the Plan in-

curred sizeable losses. There is no dispute that the investments were blatantly improper and violated ERISA "prudent man" standards.[1] A-29 to A-30.

In February, 1985, before any losses were realized or suspected, Dawson was succeeded as trustee of the Plan by respondent Sovran Bank/Maryland. A-30. However, Sovran evidently failed to investigate and recognize the impropriety of the investments or their inadequate documentation. Sovran did little if anything during its four-and-one-half-year tenure as trustee to liquidate the improper investments or to seek indemnification from Dawson, thus allowing time limits under Dawson's fidelity bond and liability insurance policies to lapse. The full extent of the irregularities eventually became apparent to Fairway when Sovran wrote off the investments in its 1988 annual report. In August, 1989 Fairway fired Sovran as trustee and hired Chemung Canal Trust Company in its place. A-16, A-30 to A-31.

The new trustee and two plan participants promptly sued Sovran in the United States District Court for the Western District of New York for neglecting its fiduciary duties under ERISA. The Complaint alleged that Sovran failed to investigate the Plan's assets, dispose of its imprudent investments, or bring timely claims against Dawson and the bond and insurance companies from whom claims against Dawson could have been recovered. A-16, 1-30. On behalf of the Plan, Chemung sought damages of $1,507,313.34, plus interest, from Sovran.

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[1] The investments violated ERISA because of their risk and lack of diversification; in addition, Dawson had a personal interest in certain of the principal investments. ERISA section 404(a)(1)(B) (29 U.S.C. § 1104(a)(1)(B)) requires a pension plan fiduciary to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." A-3. The statute also requires that pension plan investments be diversified (29 U.S.C. §1104(a)(1)(C)) and forbids self-dealing transactions (29 U.S.C. § 1106).

Sovran struck back, however, by filing a third-party complaint charging virtually everyone else associated with the Plan with responsibility for the Plan's losses. In addition to Fairway Spring Co., Inc. itself, Sovran sued Fairway's officers and directors, its attorney, and unnamed persons alleged to be members of an investment committee (hereinafter collectively referred to as "Fairway"). Sovran sought indemnity and contribution against Fairway for allegedly failing to discover and correct Dawson's breaches itself and for failing to disclose them to Sovran. Curiously, Sovran also filed a counterclaim for indemnity and contribution against Chemung,[2] which had aggressively instituted legal proceedings to recover the Plan's losses within five months after succeeding Sovran as trustee. A-16, A-30 to A-31.

Decisions of the District Court and Court of Appeals

On a Rule 12(c) motion by Fairway, the district court (Telesca, U.S.D.J.) dismissed the third-party complaint on the ground that ERISA provides no right of contribution or indemnity from co-fiduciaries. A-15 to A-23. The district court then issued an order under FRCP 54(b) authorizing entry of a final judgment as to the third-party claims in order to permit an immediate appeal. A-24 to A-26.

A divided panel of the Second Circuit Court of Appeals reversed. A-27 to A-41. The majority agreed with Fairway that the familiar methodology of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26 (1975), cannot support an implied cause of action for contribution and indemnity under ERISA. A-34. The court decided, however, that a right of contribution should nevertheless be rec-

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[2] ERISA specifically provides that a fiduciary is not liable with respect to any breach of fiduciary duty committed before he became a fiduciary or after he ceased to be a fiduciary. 29 U.S.C. § 1109(b). A-7.

ognized as a matter of "federal common law". A-35 to A-40. Accordingly, the third-party complaint and counterclaim were reinstated.

Judge Altimari dissented from the majority holding, stating that in his view "if Congress had intended to include a right of action for contribution and indemnification it would have done so." A-41.

Basis for Federal Jurisdiction of the District Court

The District Court had jurisdiction of the action in the first instance under section 502(e)(1) of ERISA (29 U.S.C. § 1132(e)(1)), which gives the district courts exclusive jurisdiction of civil actions for fiduciary breaches under ERISA. A-10.

WHY THE PETITION SHOULD BE GRANTED

This case concerns the interpretation of ERISA, a statute that has immediate importance to millions of American workers and their employers. The fundamental issue presented is whether, in an action against an ERISA trustee for breach of fiduciary duties, the trustee may complicate the lawsuit by seeking contribution or indemnity from others that ERISA labels as fiduciaries. The petition should be granted to resolve a conflict among the lower federal courts and because the decision of the majority below cannot be reconciled with recent decisions of this Court.

A. The circuit courts of appeals are in conflict regarding a right to contribution or indemnity under ERISA

The holding of the Second Circuit Court of Appeals that a right of contribution may be asserted as a matter of "federal common law" conflicts with decisions in other circuits.

This issue has arisen in the aftermath of a general repudiation by the courts of a right to contribution as an "implied" right. Under *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), if Congress does not expressly confer a right to seek contribution when it enacts a statute, a right of action may nevertheless be recognized (a) if Congressional intent to create the remedy is fairly implied from the statute, or (b) if the cause of action has "become part of the federal common law through the exercise of judicial power to fashion appropriate remedies." *Id.* at 90, 67 L. Ed. 2d at 762. Since ERISA contains no express right of action in favor of breaching fiduciaries for contribution or indemnity from co-fiduciaries, proponents of an ERISA right of contribution argued initially that it is "implied" in the statute.

The "implied right" argument for an ERISA right of contribution is now uniformly rejected. It founders on the very first prong of the familiar four-part analysis of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26 (1975), since a trustee of an employee benefit plan is obviously not a member of the class for whose benefit ERISA was intended. As the majority below conceded, "ERISA was enacted to protect plan participants and beneficiaries, not former fiduciaries." A-34. A number of courts have refused to recognize an ERISA right of contribution or indemnity on this straightforward ground. *See Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991) (implicitly overruling *Alton Memorial Hospital v. Metropolitan Life Insurance Co.*, 656 F.2d 245 (7th Cir. 1981)).[1]

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[1] District court cases also so holding include *Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596 (N.D. Ill. 1989); *Collini v. Wean United, Inc.*, 101 F.R.D. 408 (W.D. Pa. 1983); *Brock v. Gillikin*, 677 F. Supp. 398 (E.D.N.C. 1987); *Franklin v. Aetna Life Insurance Co.*, 10 E.B.C. 1022 (D.S.C. 1988); *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421 (M.D. Ala. 1990); and *Physicians HealthChoice, Inc. v. Trustees of Automotive Employee Benefit Trust*, 764 F. Supp. 1360 (D. Minn. 1991).

But while arguments for an "implied" right of action for contribution have seemingly been laid to rest, the notion that there is a "federal common law" right of action for contribution has crept in the back door. The majority in the Second Circuit Court of Appeals below has now held that since ERISA appropriates certain terminology and principles from the common law of trusts, and since there is a common-law right of contribution among breaching trustees, "the traditional trust law right to contribution must also be recognized as a part of ERISA." A-35.

Other courts have reached the opposite conclusion. A Maryland district court has noted that Congress freely and deliberately drew from the common law of trusts in crafting ERISA and held that since a right of contribution — "a clearly established aspect of common law" — was not incorporated, "the omission would appear intended." *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 696 (D. Md. 1990).

Similarly, in *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989), the Secretary of Labor urged the Ninth Circuit Court of Appeals to fashion a right of contribution among co-fiduciaries as a matter of federal common law.[4] The court referred to what it deemed the Secretary's "persuasive arguments", but concluded that they had already been implicitly rejected in *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989), in which the Ninth Circuit had previously held that Congress did not intend to authorize remedies under ERISA that it did not expressly incorporate. 881 F.2d at 630-31. The Ninth Circuit had noted in *Kim* that the legislative history of ERISA contained no indication that Congress was concerned with softening the impact of

[4] The Secretary of Labor appeared as *amicus curiae* in *Call* and filed a brief devoted solely to urging that a right of contribution under ERISA be recognized under federal common law. A copy of the brief filed by the Secretary in *Call* is submitted herewith as part of the Appendix. A-42 to A-66.

the statute on joint wrongdoers. 871 F.2d at 1433. The Ninth Circuit has thus rejected *both* an implied right of contribution *and* a common-law right of action for contribution.[4]

The decisions of the lower federal courts are thus irreconcilable,[5] and, in view of the importance of the issue to millions of ERISA employers and fiduciaries, the conflict should be resolved by this Court.

B. The decision of the court below is inconsistent with this Court's repeated holdings that federal common law should be fashioned only to effectuate the policy of federal legislation

The decision of the lower court should also be reviewed because it conflicts with the views expressed by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), and other decisions in which this Court has set forth the principles underlying the creation, or "fashioning", of federal common law.

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[4] The fact that the Secretary of Labor urged a position on a common-law right of contribution in *Call* suggests that this Court may well wish to solicit the Secretary's views in the present matter.

[5] The novelty of the decision of the lower court and the resulting conflict between the Circuit Courts of Appeals has attracted immediate attention from professional publications and the business community. A forthcoming article notes the significance of a right of contribution in any ERISA lawsuit, recognizes the conflict with the Ninth Circuit represented by the Second Circuit's decision, and predicts much more litigation in the area. "2d Circuit Recognizes a Right to Contribution Among Breaching Fiduciaries," ERISA Litigation Reporter, Vol. 1, No. 4 (September-October, 1991). *See also* "ERISA Incorporates Common Law of Fiduciary Contribution, Indemnity," BNA Banking Daily (Sept. 4, 1991); "Court Holds Company Accountable for Pension Trustee's Actions," *Washington Post*, p. F11 (August 26, 1991); Chernoff, J., "Bank Gets Favorable Ruling; Fiduciaries Now Must Share Responsibility for Losses," *Pensions & Investment Age*, p. 2 (August 5, 1991).

1. ***Federal common law: interpretation versus rule-making***

In *Northwest Airlines*, this Court explained that federal common law has two distinct aspects. First, the federal courts interpret federal law:

> Broadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition.

451 U.S. at 95, 67 L. Ed. 2d at 765. The task of *interpreting* statutes in the common-law tradition is, however, markedly different from the much rarer role of the federal courts in *fashioning* law in areas where there is no legislation to interpret:

> The Court also has recognized a responsibility, *in the absence of legislation*, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States, or the resolution of interstate controversies.

Id. (emphasis supplied).

The majority below, however, ignored the crucial difference between the "interpretative" and "fashioning" aspects of federal common-law-making. As this Court has stated:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to *construe* a statute is fundamentally different from the authority to *fashion* a new rule or to provide a new remedy which Congress has decided not to adopt.

Id. at 97, 67 L. Ed. 2d at 767 (emphasis supplied).

2. *The courts may fashion common law only to serve legislative policy*

The instances in which the courts are authorized to fashion federal common law are " 'few and restricted'." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 68 L. Ed. 2d 500, 509 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 650, 10 L. Ed. 2d 605, 611 (1963)). This Court has, for example, identified areas of federal labor law in which Congress has expressly or impliedly created a right, but left it to the courts to fashion the nature and extent of the right or its remedy.[7] In commercial law, the Court has found that Congress left it to the courts to fashion uniform federal rules of law for United States checks.[8] The Court fashioned a "federal common law" of public nuisance where Congress had made it clear that claims regarding the pollution of interstate or navigable waters should be controlled by federal law;[9] similarly, the Court has resorted to federal common law to determine the apportionment of the waters of an interstate stream.[10] Admiralty and maritime law is a major area in

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[7] *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972 (1957) (rights under section 301 of the Labor Management Relations Act); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 89 L. Ed. 187 (1944) (rights under Railway Labor Act).

[8] *National Metropolitan Bank v. United States*, 323 U.S. 454, 89 L. Ed. 383 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367, 87 L. Ed. 838, 841 (1943).

[9] *Illinois v. City of Milwaukee*, 406 U.S. 91, 31 L. Ed. 2d 712 (1972).

[10] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 82 L. Ed. 1202 (1938).

which "Congress has largely left to [the] Court the responsibility for fashioning the controlling rules of admiralty law."[11]

The majority below thought that it was free to fashion a right of contribution under ERISA merely because Congress had omitted to provide for contribution. However, this Court has made it clear that the power of the federal courts to supplement statutory schemes with new rights or remedies exists only to give effect to policies expressed in federal statutes. *Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275, 287 (1990); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 1 L. Ed. 2d 972, 981 (1957) (federal common law is to be fashioned "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy"); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 89 L. Ed. 187 (1944) (the right fashioned was "implied from the statute and the policy which it has adopted"). As this Court stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 11 L. Ed. 2d 804 (1964), "the federal interest guarded in all these cases is one the ultimate statement of which is derived from a federal statute." *Id.* at 426, 11 L. Ed. 2d at 822.

[11] *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 10 L. Ed. 2d 720, 724 (1963); *but see Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275, 287 (1990) (noting that the prerogatives of the federal courts in fashioning admiralty law are less restricted now that Congress has legislated so extensively in the area); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L. Ed. 2d 251 (1975); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 40 L. Ed. 2d 694 (1964) (recognizing right of contribution under federal admiralty in favor of shipowner against other joint tortfeasors); *cf. Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981) (noting that the *Stevedoring* decision did not establish a general federal right to contribution, since it was an instance of the particular power of the federal courts to fashion rules of law in admiralty cases).

There is no hint in the text or legislative history of ERISA of any policy that would be served by recognizing a right of contribution.[12] On the contrary, from beginning to end, ERISA reflects a single-minded congressional objective "to provide redress for plaintiffs — the plan's participants and beneficiaries," as the lower court itself recognized (A-39). "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142, 87 L. Ed. 2d 96, 103 (1984). In no way does recognizing a right of action for contribution tend to further the interests of plan participants and beneficiaries.

The holding of the majority below was based on its own sense of policy — unrelated to the policy of ERISA — that there is "no reason why a single fiduciary who is only partially responsible for a loss should bear its brunt." A-36. There was no reason *arising out of the policy of ERISA* for a right of contribution.

C. The creation of a new right of contribution disrupts the legislative balance struck by Congress in crafting ERISA

Just as the majority below failed to appreciate that the creation of new common-law rights of action is justified only to effectuate legislative policy, it also failed to note that the policy of ERISA

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[12] The majority below, noting that contribution was available to joint malfeasors under traditional trust law (A-35), evidently felt that Congress had imported the policy of trust law into ERISA wholesale. In fact, while ERISA does employ many concepts and much terminology from trust law, Congress did so selectively and, moreover, altered and embellished trust law in key substantive areas of ERISA. In particular, Congress defined "fiduciaries" much more broadly (see pages 16-18 and note 13 below) than under traditional trust law (see 29 U.S.C. § 1105(a) (A-4)). Consequently, it is an inappropriate leap of logic to conclude that *every* policy of traditional trust law is *also* a policy of ERISA.

could well be undermined by a right of action for contribution and indemnity. The majority below thus failed to consider the extent to which the creation of a new right of contribution "might upset carefully considered legislative programs." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981).

1. A chilling effect on employers and trustees

After seventeen years of implementation, ERISA now covers what must be literally millions of private pension plans. Obviously, however, many employers who have established ERISA plans lack not only the expertise to comply with the statute's technical requirements — which, indeed, have spawned a new breed of pension lawyers — but also an understanding of the prudent investment techniques mandated by ERISA. In authorizing employer-fiduciaries to delegate "exclusive authority and discretion to manage and control" plan assets (29 U.S.C. § 1103(a)) to trustees, therefore, Congress clearly expected that many employers — especially smaller companies like petitioner Fairway — would hire pension plan professionals to manage and invest plan assets. ERISA Section 405(a) (29 U.S.C. § 1105(a) (A-4), for example, which limits the liability of a co-fiduciary to circumstances in which he either participates in a breach, enables another fiduciary to commit a breach, or fails to act reasonably when a breach comes to his attention, appears to have been drafted specifically with such employer-fiduciaries in mind.

The limitations of section 405(a) strongly suggest that Congress wanted to protect employers who, in good faith, entrust plan assets to trust companies like respondent Sovran and other professionals. Congress patently did not want the fear of being sued to discourage small employers from establishing retirement plans. Such a result would have worked against "the public interest in encouraging the formation of employee benefit plans" (*Pi-*

lot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 52 (1987)) and the interests of the workers for whose benefit ERISA was enacted in the first place (see 29 U.S.C. § 1001(a)).

The result below will surely tend to discourage small employers like Fairway from establishing ERISA plans. A similar chill will fall on professional trustees like co-petitioner Chemung. Knowledgeable professionals will be reluctant to step into situations where malfeasance by former trustees is suspected if they can be subjected to the sort of counter-attack launched on Chemung by Sovran in the present case.

The result portended by the majority below thus threatens to expose employers like Fairway, and professionals like Chemung, to new liabilities that will disrupt Congress's carefully considered legislative program. ERISA Section 403(a) allowed Fairway to appoint and rely on "professionals" to properly oversee investment of plan assets. But the third-party complaint against Fairway attempts to hold Fairway responsible for the precise functions Dawson and later Sovran *itself* were hired to perform. Liability of this character is not consistent with the policies of ERISA. Under *Northwest*, recognition of a common-law right of action for contribution and indemnity in these circumstances is impermissible.

2. Greater expense and effort for ERISA plaintiffs

A rule allowing claims for contribution will interfere with the Congressional scheme in another way as well. According to the majority in the Second Circuit, an ERISA plaintiff "does not care whether the defendant has a right of contribution against others, as long as the plaintiff recovers the amount to which he is entitled." On the contrary, however, ERISA plaintiffs care about their ability to prosecute claims quickly and economically. This Court is well aware that the proliferation of multi-party lawsuits in recent years has contributed heavily to the length and expense of litigation. Each new party to an action generates more pleadings, more depositions, more document production, more motions, more time from the institution of an action until trial, and longer trials. An ERISA plaintiff is prejudiced when his lawsuit is complicated with unwanted counterclaims and third-party actions.

This very case illustrates the point. The action was born as a straightforward claim on behalf of a pension plan against a former trustee who had neglected his fiduciary obligations to the plan. Thanks to the contribution claims sanctioned by the majority below, however, it has mushroomed into an expensive multi-party maze of original claims, counterclaims, and third-party claims. There are now 12 parties, most of whom appear in several different capacities in the two-page caption of the case. There is no longer one main issue in the action; there are at least half a

dozen. The original plaintiffs can no longer focus their energies on proving Sovran Bank's breach of fiduciary duty, as the interests of the plan and its beneficiaries would suggest. Instead, they are themselves on the defensive. The resources of Fairway Spring Co., Inc., which created and maintains the plan, are diluted and diverted from the main object.

Compounding the problem is the fact that the possibilities for third-party actions against ERISA "fiduciaries" are legion — far greater than under traditional trust law. ERISA defines a fiduciary broadly as any person who (1) exercises any discretionary authority or discretionary control respecting the management of an employee benefit plan or the management or disposition of its assets, (2) renders investment advice for a fee or other compensation with respect to any monies or other property of the plan, or (3) has any authority or responsibility to do so, or (4) has any discretionary authority or discretionary responsibility in the administration of the plan. 29 U.S.C. § 1002(21)(A). Under ERISA, as under traditional trust law, the very nature of roles such as plan trustee requires performance of one or more of these functions and thus gives rise to fiduciary status. 29 C.F.R. § 2509.75-8, at D-3. However, Congress intended the definition to be broadly construed to include persons who have authority and responsibility over a plan, without regard to their particular titles. *Donovan*

v. Mercer, 747 F.2d 304 (5th Cir. 1984).[13] Indeed, the United States Department of Labor has indicated that even *participants* of a plan can be fiduciaries when, for example, they are given respon-

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[13] The following cases indicate the breadth and variety of persons and entities that have been found to be fiduciaries under ERISA:

1. Pension plan service company (*Brock v. Self*, 632 F. Supp. 1509 (W.D. La. 1986));

2. Officers and directors of plan service company (*Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980));

3. Officer of employer sponsoring plan (*Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988));

4. Parent company of employer sponsoring plan (*Hazel v. Curtiss-Wright Corp.*, 12 E.B.C. 1810 (S.D. Ind. 1990));

5. Insurance company which sold annuity contract to plan (*Peoria Union Stock Yards Company Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983));

6. Insurance company providing coverage under health plan (*Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990));

7. Insurance broker/consultant to plan (*Brink v. DaLesio*, 496 F. Supp. 1350 (D. Md. 1980), *aff'd in relevant part*, 667 F.2d 420 (4th Cir. 1981).

8. Stock broker assigned to pension plan account (*Stanton v. Shearson Lehman/American Express, Inc.*, 631 F. Supp. 100 (N.D. Ga. 1986));

9. Union representative recommending specific dental program for collectively bargained health plan (*Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988));

10. Arbitrator asked to resolve claim for pension benefit (DOL Advisory Op. No. 79-66A (September 14, 1979));

11. Arbitrator selected to settle dispute between union and employer trustees of collectively bargained plan (DOL Advisory Op. No. 82-42A (August 16, 1982));

12. Illinois Director of Insurance acting under state order to liquidate health plan (*Mutual Life Ins. Co. of New York v. Yampol*, 840 F.2d 421 (7th Cir. 1988));

13. Receiver appointed by bankruptcy court for company sponsoring plan (*Kaleidoscope, Inc. Profit Sharing Plan v. Scroggins*, 492 F. Supp. 1027 (N.D. Ga. 1980));

14. Resolution Trust Corporation exercising receivership powers over failed savings and loan association sponsoring plan (*Rosa v. Resolution Trust Corp.*, 752 F. Supp. 1231 (D.N.J. 1990), *reversed on other grounds*, 938 F.2d 383 (3d Cir. 1991)); and

15. Attorney advising plan participant regarding benefit paid from plan (*Chapman v. Klemick*, 750 F. Supp. 520 (S.D. Fla. 1990)).

sibility for voting stock allocated to their plan accounts. Letter from Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, U.S. Department of Labor (Feb. 23, 1989).

Consequently, ERISA fiduciary status may be acquired, even unknowingly, in ways unheard of under the common law of trusts. The number of ERISA fiduciaries with respect to a single plan is thus much greater than under traditional trust law (29 C.F.R. § 2509.75-8 at FR-12), as is the potential for multiplied claims, counterclaims, and third-party claims for contribution among fiduciaries in a single action. If the broad ERISA definition of "fiduciary" is taken into account, it becomes even more inconceivable that Congress contemplated or approved rights of action for contribution or indemnity against fiduciaries like Fairway Springs and its officers and agents.

The result of the determination below will be to make ERISA litigation more drawn-out, expensive, complicated, and uncertain for the very class of persons ERISA was intended to benefit. Of course, if Congress had actually determined that ensuring a more equitable distribution of liability was worth imposing delay, expense, and complication on ERISA plaintiffs, it would be a different matter. The involuntary metamorphosis of a two-party lawsuit into complex multi-party litigation would be beside the point. But even the lower court conceded that there was no evidence in the legislative history of ERISA that Congress was concerned that a breaching fiduciary might have to pay more than his fair share. A-39 to A-40.

This Court stated in *Russell* that it was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 147, 87 L. Ed. 2d 96, 106 (1984). The lower court clearly did not share that reluctance, and its creation of a potentially disruptive new right of action should be reviewed by this Court.

D. Under *Russell*, the courts should not fashion common-law rights or remedies that were omitted from the comprehensive legislative scheme of ERISA

As Justice O'Connor recently emphasized in *Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275 (1990), the power of the federal courts to fashion common law exists only at the sufferance of Congress. 112 L. Ed. 2d at 287. Consequently, new rights or remedies should not be fashioned without considering what Congress has already done in the area:

> The *presumption* that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary *may not*, in the face of . . . comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981) (emphasis supplied). This presumption was ignored by the majority in the court below.

The recognition of an ERISA right of action of contribution or indemnity clearly constitutes fashioning "a new remedy". Indeed, *Northwest Airlines* itself involved the issue of whether "federal common law" should be invoked to create a right to contribution in the context of the Equal Pay Act; the Court declined to do so on the explicit ground that the comprehensive statute precluded the courts from fashioning new remedies. *Id.* at 97-98, 67 L. Ed. 2d at 767-68.

Similarly, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 68 L. Ed. 2d 500 (1981), this Court again declined to create a right of contribution — this time under the Sherman Act — for precisely the same reason: it would amount to creating

a cause of action in the face of detailed, specific remedial provisions in a comprehensive statute. *Id.* at 644-46, 68 L. Ed. 2d at 511-12.[14]

Faced squarely with the issue of whether to create an ERISA right of contribution among co-fiduciaries as a matter of "federal common law", therefore, the Second Circuit should have considered, in the first instance, whether the ERISA statute amounts to a "comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981). That question has been answered by this Court on several occasions:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's *interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."*

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 106 (1984) (declining to authorize recovery of punitive damages) (emphasis supplied). *Accord, Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108, 103 L. Ed. 2d 80, 91 (1989) (noting that ERISA provides a "panoply" of remedies); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 95 L.

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[14] Contrary to this Court's holdings in *Northwest Airlines* and *Texas Industries*, the majority in the lower court asserted that a right of contribution was not a "right of action", but merely a "procedural device". A-34. It is odd, however, for petitioner Fairway Spring Co., Inc. to be held in as a third-party defendant in this action if Sovran Bank has no "right of action" against it.

Ed. 2d 39, 52 (1987) (noting the "deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies").

Indeed, ERISA defines the rights and obligations of fiduciaries and trustees — including co-fiduciaries — in detail. ERISA Section 403 (29 U.S.C. § 1103) specifies, for example, that the assets of every employee benefit plan must be held by an appointed trustee who "shall have exclusive authority and discretion to manage and control the assets of the plan." Section 404 (29 U.S.C. § 1104) requires that plan assets be diversified and invested as a "prudent man" would do. ERISA's detail extends to the different forms of relief available, including different forms of monetary and injunctive relief, attorneys' fees, and civil penalties, *see* 29 U.S.C. § 1132(a), (g), and (i). For each form of relief available, ERISA Section 502(a) specifies persons entitled to bring an action. 29 U.S.C. § 1132(a). Significantly, co-fiduciaries are not among those specified.

With equal significance, ERISA sets forth, narrowly and carefully, the precise circumstances under which a fiduciary may be held liable for a co-fiduciary's breach. Section 405(a) of ERISA provides:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). "[T]his section parrots the Restatement (Second) of Trusts § 224(2) . . . ." *NARDA, Inc. v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F. Supp. 685, 697 (D. Md. 1990).

In section 405(a), therefore, Congress expressly determined that there should be circumstances under which co-fiduciaries could be jointly liable for ERISA breaches, and in section 502(a), Congress specified the persons entitled to sue for various forms of relief. Having touched the subject this closely, Congress went no further. Congress did not provide for a third-party right of action for contribution or indemnity.

This Court observed in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), that the responsibility of the judiciary to *fashion* federal common law — not merely to construe or interpret, but to acknowledge new rights and remedies — arises in "the *absence* of legislation." *Id.* at 95, 67 L. Ed. 2d at 765 (emphasis supplied). But there was no "absence of legislation" in the present case. On the contrary, there was a veritable abundance of legislation. The majority below thus not only failed to take into account that ERISA is, taken as a whole, a " 'comprehensive and reticulated statute' " with an "interlocking, interrelated, and interdependent remedial scheme," as this Court had already held in *Russell*, but also ignored the fact that Congress even included specific provisions for liability of co-fiduciaries — *the very subject area* in which the court was being asked to create a new right under "federal common law"!

These matters did not escape the district court below, which wrote:

> As section 1105(a) demonstrates, Congress carefully and narrowly defined the circumstances under which a fiduciary could be held personally liable for a co-fiduciary's breach. . . . Given Congress' attempts to "precisely tailor fiduciary liability to fit particular breaches, . . . [i]t is not surprising that rights of indemnification and contribution among culpable fiduciaries are not provided.

Chemung Canal Trust Co. v. Sovran Bank/Maryland, 753 F. Supp. 81, 84 (W.D.N.Y. 1990) (Telesca, J.) (A-20).

Judge Altimari, dissenting from the majority decision below, was of the same view:

> It seems clear that Congress was aware that the issue of fiduciary indemnification and contribution was bound to arise under ERISA. Indeed, a section of the statute delineates the circumstances in which a co-fiduciary may be liable for another fiduciary's breach of fiduciary responsibility. *See* 29 U.S.C. § 1105 (1988). Moreover, it is equally apparent that Congress was conscious that the general principles of trust law, upon which ERISA is based, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), would allow a breaching fiduciary to obtain indemnification and contribution from other wrongdoers. *See Restatement (second) of Trusts* § 258 (1959). Despite its obvious awareness of both the problem at hand and its potential solution, Congress, in crafting ERISA's "interlocking, interrelated and interdependent remedial scheme," *see Russell*, 473 U.S. at 146, failed to provide remedies in favor of breaching fiduciaries. Essentially, Congress' omission of all references to the allocation of costs among fiduciaries for joint liabilities demonstrates its rejection of the scheme of contribution and indemnification adopted by the majority.

A-41.

The majority in the Court of Appeals ignored the "comprehensive legislative scheme" represented by ERISA and thus failed to give effect to the "strong presumption" (*see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981)) that Congress deliberately omitted a right of contribution against co-fiduciaries from ERISA. The determination below should be reviewed by this Court.

E. The majority below erroneously interpreted this Court's decision in *Firestone* as a general authorization for judicial enactment of new ERISA rights and remedies

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 92 (1989), this Court observed that because ERISA has its roots in American trust law and terminology, the courts must " 'develop a federal common law of rights and obligations under ERISA-regulated plans.' " *Id.* at 110, 103 L. Ed. 2d at 92 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 95 L. Ed. 2d 39, 53 (1987)). The Court also alluded to remarks of the late Senator Jacob Javits, in connection with the Congressional enactment of ERISA, expressing an expectation that a body of federal substantive law would be developed by the courts. *Id.* at 110, 103 L. Ed. 2d at 92.

Led on by respondent Sovran, the majority in the Court of Appeals misapprehended and misapplied the Court's observations in *Firestone*. Its decision seized upon the Court's language as an open invitation to fashion new rights and remedies as "federal common law" under ERISA. A-35. "[U]nder ERISA," the lower court held, "both the legislative history and the statute itself clearly contemplate development of a federal common law." A-37.

The majority below ignored the fundamental distinction, explained by this Court in *Northwestern Airlines, Inc. v. Transport*

Workers Union, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), between the frequent duty of the courts to employ "federal common law" in *construing* and *interpreting* statutes, and the limited authority of the courts to *fashion* rights and remedies as "federal common law". Its decision also failed to consider that the issues in *Firestone* did not involve either creating a new right or remedy. On the contrary, Congress had, in 29 U.S.C. § 1132(a)(1)(B), "explicitly" authorized civil actions by employees to enforce their rights to pension benefits. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 92 (1989). However, ERISA did "not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." Thus, in *Firestone*, Congress had plainly established, by statute, an ERISA right to sue, but had left to the courts the task of fleshing out that right — a task which this Court performed in the common-law tradition by reference to traditional principles and rules of trust law. This was "federal common law", to be sure, but it was an instance of supplying "a need for judicial interpretation of ambiguous or incomplete provisions." *Northwestern Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981). It did not amount to fashioning a new right or remedy.

It is respectfully submitted that this Court never intended to sanction wholesale creation of new substantive rights and remedies under ERISA as "federal common law". That error underlies the decision of the majority below, which should be reviewed by this Court.

CONCLUSION

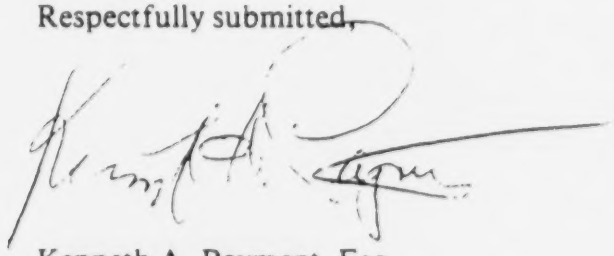
The majority below ignored this Court's admonition that new rights and remedies should not be created in the face of a comprehensive statutory scheme of enforcement. The lower court was thus not warranted in creating a new right of action for contribu-

tion or indemnity in favor of one ERISA fiduciary against another under the guise of "federal common law". The majority below similarly disregarded this Court's direction that new "federal common law" rights be grounded in legislative policy; the right of contribution it "fashioned" not only has no basis in ERISA policy, but positively undermines it.

With circuit courts divided on this issue, Fairway respectfully urges that the Court grant the petition and set the case for argument.

October 21, 1991

Respectfully submitted,



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